United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1213

To be argued by
PHYLIS SKLOOT BAMBERGER

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

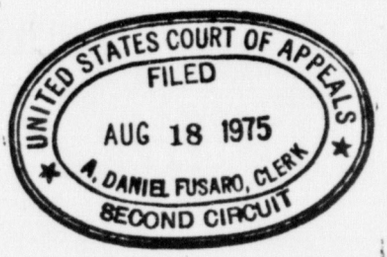
MICHAEL GLAZER,

Appellant.

Docket No. 75-1213

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether the District Judge's charge to the jurors was erroneous because it instructed them that they could find appellant Glazer guilty of a crime not charged based on an act he did not perform.

2. Whether the hearsay evidence of appellant's connection with Wagner was improperly admitted into evidence.

3. Whether it was error for the District Judge to sentence appellant to a committed fine when appellant was indigent.

4. Whether, under the circumstances of this case, the $10,000 fine was cruel and unusual punishment, and so oppressive as to require this Court to vacate that part of the sentence.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lloyd F. MacMahon) entered on May 28, 1975, after a trial before a jury, convicting appellant Michael Glazer of one count (Count Seven) of making a false statement (18 U.S.C. §§1001, 2). Appellant Glazer was sentenced to three months' imprisonment and to a committed fine of $10,000. He remains free on bail pending appeal.

By order dated July 14, 1975, this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal for Mr. Glazer, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Charges

Appellant Glazer was indicted for conspiracy* to defraud the United States and to make false statements in violation of 18 U.S.C. §1001. He was also charged with two substantive counts of making a false statement in each of two bids for Federally-funded urban renewal moving jobs,

> ... to wit, that there had been no agreement with any other person to fix the price, or any part of the price, and to submit a sham or collusive proposal or bid, whereas in truth and in fact, as the defendants then and there well knew, they had entered into such an agreement.

COUNT	DATE	AMOUNT OF BID
6	December 13, 1973	$ 294,000
7	December 27, 1973	$ 272,000

These charges were premised on the bid forms, which require that the bidder certify

> ... [t]hat, I have not been a party to any agreement whatever, with any other person to fix the price, or any part of the price, or to submit a sham or collusive proposal or bid[.]...

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*Co-conspirators were Jack Kay, Harvey Marks, Sanford Scher, Nicholas Sinigaglia, and Samuel Wagner. Kay was tried with appellant Glazer; the charges against Marks were dismissed (separate set of minutes of April 21, 1975, consisting of two pages); the other men pleaded guilty prior to trial (separate set of minutes of April 21, 1975). The indictment is "B" to appellant's separate appendix.

Appellant Glazer was acquitted of conspiracy and convicted of making a false statement in his December 27 bid. The jury reached no verdict as to the first bid, and the charge was dismissed (Minutes of May 28, 1975, at 3).

The record shows that Universal Metal Chain Company ("Universal"), headed by Richard Laupot, was located in an urban renewal site and had to relocate, moving its stock, huge presses, and other equipment. Laupot hired Dennis Green, doing business as Businessmen's Relocation (43*), to make preparations for the move. Since the cost of the move was to be borne by New York City and the Federal government, Green's job included filing with the City the bids of three movers who were interested in the job (53, 62).** Laupot also delegated to Green the task of determining which movers would be asked to file bids.*** For his services, the business to be moved would pay Green a small fee and the company which received the moving contract would agree in a written contract to pay Green the

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*Numerals in parentheses refer to pages of the trial transcript.

**More than three bidders were permitted to submit estimates. although a minimum of three were required. The low bidder who was also within the estimate of the cost made by the City after its own examination of the business to be moved (23, 26) was awarded the contract.

***Under the procedure, the three movers to submit bids are selected by the commercial party to be moved, rather than by the City (25). Bids are sealed, and sent to the City for opening on a specific date (24).

equivalent of ten percent of the cost of the move.

B. Arrangements for the Agreement

A substantial portion of the Government's evidence involved the period between November 6, 1973, and November 11, 1973, involving no mention of appellant Glazer. During this time, Jack Kay and Samuel Wagner were devising a method of getting the contract to move Universal. Their efforts were revealed through the testimony of Dennis Green and Richard Laupot, both of whom were acting as Government agents,* as well as through tape recordings of the conversations Green and Laupot had with Kay and Wagner. The Government showed that during the fall of 1973 Wagner and Kay went to an employee of Universal expressing an interest in the Universal relocation job (183). Pursuant to Universal's agreement with Green, Wagner and Kay were advised to contact him (183).

Wagner and Kay met Green on November 6, 1973. They told Green that they were interested in doing the moving work for some of his clients and that for such work they

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*The Government solicited Green's cooperation after his conviction in Federal court for wire fraud involving improper retention of funds which were to be given to a mover. Through a Rule 35 motion, his cooperation in the investigation of this case was to be brought to the attention of the judge who had sentenced him to a year in prison (58-59).

Green also admitted submitting a false bill to Federal authorities in connection with another matter.

would be willing to give him part of his ten percent fee in advance and would attempt to help Green with some of the problems he was having with City officials as a result of his convictions (66, 76). Then Wagner and Kay asked Green to give them the Universal moving job (67). When Green advised Wagner and Kay that the procedure was for the lowest bidder to receive the contract, they both expressed surprise about this change in the law* (Tape Tr., Nov. 6, 1973, at 16**). Green, however, indicated some interest when he inquired whether Wagner and Kay could do anything for Laupot, who had filed a claim for $12,000 for wiring, which the City had rejected (76). Kay and Wagner agreed to meet with Green again the following day.

At that meeting, Green wanted to know why he should transfer his business from his regular movers to Wagner. Kay and Wagner indicated that if Green permitted them to arrange the bids and be the low bidder, they would pay Universal $6,000 in cash (81; Tape Tr., Nov. 7, 1973, at 13), and that they would help Green with his problems at

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*Under the prior law, any bidder could get the contract provided he did the job within the cost of the lowest bid (192).

**Transcripts of the tape recordings of the several conversations between Green, Kay, and Wagner were introduced as Government Exhibits #14 through #24, and were stipulated as correct by the parties (71). Counsel objected to the admission of the transcripts against appellant Glazer as not binding on him. The District Judge gave counsel a continuing objection, and admitted the transcripts subject to connection (138, 253).

City agencies (Tape Tr., Nov. 7, 1973, at 9).

Wagner explained that he would pay Green his ten percent fee even if Wagner lost money on the move; that he just wanted business and did not want to make "waves;" and that he knew many movers in the business, having been in the moving business himself for some thirty years (id. at 38-39). Wagner said that Green could not know how Wagner could help him until Green used Wagner's services (id. at 40). Green again expressed doubts, and Wagner again encouraged Green to try his services (id. at 47). Green then asked how they were going to do the bids (id. at 47).

Wagner told Green that Green could send bid letters to three legitimate and reliable movers designated by Wagner. The three movers would then examine Universal's plant and would prepare bids (id. at 47-48, 51). At that point Wagner would be able to tell Green who the low bidder would be (id. at 49). In later conversation, Kay, Wagner, and Green decided that Wagner must be the low bidder in order that Green could be assured of receiving his ten percent fee (id. at 50-51), since Wagner could not sign Green's contract for another mover. Wagner insisted that he was not connected with any mover so that, when the bids came in, the City would not be suspicious that they were being submitted by a group which worked together (id. at 52).

Wagner assured Green that the people with hom he did business could be trusted because Wagner had worked with

them for years (id. at 54, 57). Wagner said he could save Green work by supplying the bidders, and said Green could ask anyone except a mover named Mariani, whom Wagner was suing (id. at 67). Wagner explained that Green could use any movers Wagner would name, and those movers would do whatever Wagner wanted (id. at 68).

The plan discussed by Green and Wagner was for the two of them to examine the Universal plant to determine a price, after which Green would send out the bid forms (id. at 69). As Green explained, the whole plan was subject to negotiation and to Laupot's approval (id. at 13, 70-71, 73-77).

Although at trial Green testified that Wagner said that Stuyvesant Moving Vans, Inc. ("Stuyvesant"), appellant Glazer's firm, was one of the bidders (84), the transcript of the taped conversations contradicts that assertion. In their discussions, Wagner, Kay, and Green mentioned the names of several movers, including Stuyvesant (Tape Tr., November 7, 1973, at 52, 53). Further, later in that conversation, Wagner said that Green could request bids from anyone (id. at 67) except Mariani.

Laupot attended the next meeting, held on November 26, 1973, to ask Wagner and Kay questions about the deal. Because Laupot was to receive $6,000 from Wagner and Kay, he was concerned about signing a Government form* asserting

*This form was an assignment to the mover by the party being moved of payment for the cost of the move.

that he had received no payment from the mover. Wagner assured Laupot that he need not be concerned since the $6,000 payment was to be made in cash (Tape Tr., Nov. 26, 1973, at 8).

On November 29, 1973, Laupot again raised the question of how Wagner and Kay would be assured of getting the contract as low bidder. Wagner and Kay again replied that it was their business and that Laupot need not be concerned with it (Tape Tr., Nov. 29, 1973, at 15). At another meeting with Green, Wagner and Kay stated that they would bid jointly with Nick Sinigaglia, who would be moving the heavy machinery (rigging) (93, 276), and that Wagner and Sinigaglia would be present when the bids were opened (95).

On December 6, 1973, Green and Wagner finally reached an agreement, and Wagner and Sinigaglia signed Green's usual fee contract. Green then gave Wagner the bid forms (110). Wagner suggested that he give one of the forms to Harold Farber, but this idea was vetoed because Green did not get along with Farber* (Tape Tr., Dec. 6, 1973, at 34).

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*Harold Farber was apparently the mover who transported part of the Universal company to its new site in Pennsylvania (Tape Tr., Nov. 7, 1973, at 11-12).

C. The First Bid

Not until Wagner had signed Green's contract did Wagner contact appellant Glazer. According to Harvey Marks,* an employee of appellant Glazer's (226) whose job was to estimate for Stuyvesant the cost of moving jobs so that Stuyvesant could submit bids and give job cost estimates to potential customers, Wagner came to appellant Glazer's office at Stuyvesant Moving Vans, Inc., in December 1973 (228). Marks and appellant were present. Wagner asked them if they were aware of a big moving job in Brooklyn, and told Marks and appellant that if they were interested in bidding on it, "maybe if I don't get it, you will get it." Wagner told them it was for Universal Metal Chain Company. He then left Glazer's office (229-230).

Marks expressed surprise that Wagner, a competitor, had come to tell them about a job. Appellant told Marks to go look at the job and that they would bid on it (230).

An employee of Universal escorted Marks and Wagner in a survey of the Universal buildings and Marks left a Stuyvesant business card with that employee (231). Marks did not discuss the move with Wagner (231). Upon returning to to Stuyvesant to see appellant, Marks told Glazer it was the biggest job he had ever seen, mentioning the size of

*The case against Marks was dismissed prior to trial (Minutes of April 21, 1975), apparently for failure to prosecute timely (447). Marks became a Government witness.

of the machines involved (232). With the aid of notes he had made, Marks told appellant that he estimated that the job was between $250,000 and $300,000 (232.

Then appellant and Marks discussed the words to use in the proposal and both of them agreed on the price (233). Their bid for $294,000 was submitted over appellant's signature, who thereby certified he had not been a party to any agreement to fix the price of any bid or to file collusive or sham bids.

Appellant* testified that he did not know Green (315), but that Wagner had told him of the job. Appellant told Wagner he did not do relocation work (319, 332), but that he would probably bid on the Universal job anyway (332) since business was slow at the time (332). He testified that he and Marks computed the price Stuyvesant would submit as its bid after Marks had examined the site (318-319), and testified further that he discussed the bid only with Marks (325).

On cross-examination, the prosecutor attempted to impeach appellant Glazer's direct testimony that he had not made a false statement in the bid form. In the bid form appellant certified that he had been selected to bid by Universal, although it was Wagner who came to him (328-329). He explained that when Marks went to Universal, he met an

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*Appellant Glazer was sixty-three years old and had been in the moving business for eighteen years (315). He has no prior criminal record.

employee of that firm who escorted him on his examination of the Universal plant, and that Marks had left a business card with that employee (331).

The Government sought to add to this evidence the hearsay testimony of Green as to what Wagner had told him about appellant. Green testified that Wagner told him on December 11, 1973, that the bidders would be Stuyvesant, Sanford, and himself (113), and that Marks, from Stuyvesant, was coming out to look at the Universal plant (114). Green testified that Wagner also said he had learned that the City's estimate for moving the machinery was $40,000 or $50,000; that he would bid $80,000 or $90,000;* and that the other bidders would bid higher. The transcript of the taped conversation of December 11, 1973, reflects that Wagner said his bid would be set on his ICC tariff** with a flat fee for the machinery moving (rigging) to be done by Sinigaglia (id. at 7).

The three bids on the Universal relocation job were opened on December 13, 1973. They were for $274,000

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*Nick Sinigaglia, who would move the heavy machinery (rigger), said a job half the size of the Universal job would be $55,000 (Tape Tr., Dec. 11, 1973, at 5).

**Marks explained that, in accord with ICC regulations, each mover must file a list of tariffs or rates, and that this list is a public record (248) available for examination by other movers (246). Stuyvesant was known as a high tariff mover (247), and, as such, did not often beat Wagner in a bid, but did so occasionally (250).

(Sanford); $294,000 (appellant); and $250,000 (Wagner). Both Sanford and Wagner were present (115). In a proposal written on Stuyvesant letterhead, each Universal building involved in the relocation was listed with a statement of the work to be done (Government Exhibit #3). According to the City employee who explained the bidding procedure, this was more than the bid form required (28). These bids omitted the cost for moving one of Universal's buildings and included some work which was part of another bid (117-118). All the bids were excessive when compared to the City's own estimate of $191,598 (29) (Government Exhibit #8) (33). The bids were therefore rejected.

D. The Second Bid

Testifying for the Government, Marks testified that after the bids were opened, a New York City employee called to tell thim that Stuyvesant's bid was not the low one, and that the job would have to be re-bid because another building was added to the bid and the carpentry and masonry work was to be omitted, as well as the cost of certain materials to be moved to Pennsylvania (235, 244).

Marks told appellant what "the City" had told him (245), and he and appellant discussed the language on the new bid. Appellant selected the revised bid price (236). Neither appellant nor Marks visited the additional building, although

they had estimated costs in other jobs on specification, without visiting the site (237).

Here, too, the Government used Green's hearsay testimony regarding what Wagner had told him. Green stated that Wagner called to say he had called the other bidders to tell them what was wrong with the bids (119-120). It was Wagner's scheme to have either Green or Laupot call the City agency to say that the only problem in the bids was the omitted building and to suggest that an amendment to the original bids be filed by means of a letter rather than the filing of entirely new bids.

However, on December 18, 1973, Green told Wagner and Kay that the City wanted new bids and that he had the new forms (123). On December 21, Wagner went to Green's office, where Green showed Wagner the first set of bids. The bids were properly in Green's possession, and Wagner examined each of them very carefully, saying they looked fine to him (125). The transcript of the taped conversation of December 21 (at 10) shows Wagner saying that, on the second bid, he would bid $15,000 lower. Green gave Wagner the new bid forms (125). Green said that Wagner indicated another mover might be substituted for Sanford. However, according to Green, Wagner told Green on December 27 that the three bidders would remain the same.

A second set of sealed bids (49) was received. The bids were opened on December 28, 1973 (31). Again, Wagner

was the low bidder.*

E. After the Evidence

In his charge to the jury** on the substantive count, Judge Macmahon stated:

> ... In order to convict ... the Defendant Glazer on Counts 6 and 7, the Government must prove to your satisfaction beyond a reasonable doubt each of the following three elements:
>
> One: That on or about the date set forth in the count which you are considering the defendant whom you are considering made or caused to be made a statement or representation.
>
> Two: That the statement or representation was false, fictitious or fraudulent.

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*The contract was not awarded, however, and a third bid opening occurred with only one mover -- Washington -- participating (37). Washington had bid $191,000; the City negotiated the figure down to $171,000 (45), and then Washington backed out (38, 285). When asked why there was only one bidder participating in the third set of bids, the City employee asserted that it was not necessary to have three bidders at that point because the original bid had consisted of the three bids required (46, 47). He acknowledged that such a procedure made it possible for a fourth bidder to come in, ascertain what the earlier three bids had been, and bid lower than those bids (47).

The District Judge refused to permit further examination of this procedure, and chose to emphasize, in the jurors' presence, that the witness said this procedure was unusual (47-48).

The contract was ultimately awarded to Williams Moving Company for $171,000 (277).

**The complete charge to the jury is "C" to appellant's separate appendix.

> Three: That the defendant knew that the statement or representation was false, fictitious or fraudulent.
>
> (416).
>
> As to the second element that the statement or representation was false, fictitious or fraudulent, if you find that the defendant whom you are considering certified on the bid submitted to the New York City Housing Development Administration that there had been no agreement to fix the bid price or any part of the bid price, or to submit a sham or collusive bid when in fact there was such an agreement, then the second element has been satisfied.
>
> As to the third element that the defendant whom you are considering knew that the statement or representation was false, fictitious or fraudulent, you apply the same instructions I gave you earlier on the subject of what constitues knowledge, intent and willfulness.
>
> (417).*

After deliberating, the jury acquitted appellant Glazer of the conspiracy, failed to reach a verdict with respect to the first bid (Count Six), and convicted him with respect to the second bid (Count Seven).

At sentencing, Mr. Glazer received a term of ninety days in prison with a $10,000 committed fine. Defense counsel advised the court that appellant's financial statement to the Probation Department indicated that he was insolvent (Minutes of May 28, 1975). The District Judge nonetheless reiterated

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*After the jurors began their deliberations, it was revealed that the Assistant U.S. Attorney had intended to dismiss the case against appellant Glazer if all the other defendants had pleaded guilty.

his sentence.

Counsel retained for trial was subsequently relieved as counsel on appeal. By order dated July 14, 1975, this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act. Appellant Glazer filed the required affidavit of financial status in this Court.

ARGUMENT

Point I

THE DISTRICT JUDGE'S CHARGE TO THE JURORS ERRONEOUSLY INSTRUCTED THAT THEY COULD FIND APPELLANT GLAZER GUILTY OF A CRIME NOT CHARGED BASED ON AN ACT HE DID NOT PERFORM.

The indictment charged that appellant Glazer and Marks knowingly and intentionally falsely stated that

> ... there had been no agreement with any other person to fix the price, or any part of the price and to submit a sham or collusive proposal or bid whereas in truth and in fact, as the defendants then and there well knew, they had entered into such an agreement.

This accusation was based on the statement signed by appellant which reads:

> ... I have not been a party to any agreement whatever, with any other person to fix the price, or any part of the price, or to submit a sham or collusive proposal or bid[.]...

The accusation is thus properly that appellant made a knowing misstatement as to whether he was a party to any agreement. However, in his charge to the jury, the District Judge stated:

> As to the second element that the statement or representation was false, fictitious or fraudulent, if you find that the defendant whom you are considering certified on the bid submitted to the New York Housing Development Administration that there had been no agree-

> ment to fix the bid price or any part of the bid price when in fact there was such an agreement, then the second element has been satisfied.
>
> (417).

Tnis instruction misstated the critical factor in the question to which appellant was responding: Was he a party to the agreement? Therefore, even if there was an agreement between others about which he was aware, he was not guilty of making the false statement charged by the Judge because he had not been asked that question.

To establish guilt under 18 U.S.C. §1001, the jury must determine that the statement was made, that it was false, and that the party making the statement knew it was false. United States v. Marchisio, 344 F.2d 653 (2d Cir. 1955). Thus, to prove appellant Glazer's guilt of the crime charged, the Government was required to prove the "actual falsity" of the representation made by appellant, United States v. Diogo, 320 F.2d 898, 902 (2d Cir. 1963), in the bid form, and the jury should have been required to find that appellant was a "party" to the agreement. As the Judge charged the jury, however, the Government need only have proved that there was an agreement, and the issue of whether appellant was a party to such an agreement was rendered irrelevant. The charge instructing the jurors on how to determine whether a question was answered falsely must advise them of the meaning of the language (see Killian v. United States, 368 U.S. 231 (1961);

Ogden v. United States, 303 F.2d 724, 744 (9th Cir. 1972), cert. denied, 376 U.S. 973 (1973); Lohman v. United States, 251 F.2d 951 (6th Cir. 1958); see also United States v. Gillilan, 288 F.2d 797, 798 (2d Cir. 1966)) unle the usage in common parlance is unambiguous (United States v. Marchisio, supra, 344 F.2d at 662). It follows, a fortiori, that if the operative word used was omitted altogether from the charge so as to change the question answered and its meaning, there is no valid jury verdict.

Appellant was thus convicted for an act he did not perform (Thompson v. Louisville, 362 U.S. 199 (1960)), and with which he was not charged in the indictment.

Further, the charge made it impossible for the jury to determine whether appellant knowingly and intentionally made a false statement. Since the critical question in determining the defendant's guilt is whether he believes his answer to be true (see Bronston v. United States, 409 U.S. 352, 359 (1973)), and to do that the jury must look at what appellant understood by the words of the question (United States v. Diogo, supra, 320 F.2d at 905-907), changing the question renders the factfinding responsibility impossible. The jurors did not decide whether appellant knowingly stated falsely that he was not a party to the agreement because they were not told to do so by the District Judge. Their finding that appellant did knowingly state falsely that there was no agreement was without factual

basis because appellant never made such a statement. Accordingly, there was no proof of a knowing falsehood. Vachon v. New Hampshire, 414 U.S. 478 (1974).

The significance of the error is highlighted by the acquittal of appellant on the conspiracy count. Having concluded that appellant was not a conspirator to the agreement to fix the bids, the jurors, if given an opportunity to rule on the matter, might well have concluded that he did not lie about whether he was a party to the agreement.

Counsel failed to object to this part of the charge. However, the instructed affected the substantial right of appellant -- to have the jury consider the crime with which he was charged in the indictment and to determine whether his conduct as he actually performed it was unlawful. This conviction was a denial of due process because appellant was convicted for conduct he did not perform and without a jury decision on the conduct with which he was charged.

Point II

THE HEARSAY EVIDENCE OF APPELLANT'S CONNECTION WITH WAGNER WAS IMPROPERLY ADMITTED INTO EVIDENCE.

During the course of the trial the Government introduced, through the testimony of Dennis Green, statements made by Kay and Wagner during conversations and meetings attended by Kay, Wagner, and Green, or Laupot. Transcripts of the tape recordings of those conversations were also admitted into evidence. Appellant Glazer was not present at any of these meetings, and did not participate in any of the conversations. Both Kay and Wagner were unavailable for cross-examination. To the extent that these conversations were used to show appellant's participation in agreements to fix the bids filed with the City of New York for the Universal relocation job, they are inadmissible.

Before hearsay declarations of an alleged joint venturer* can be used as evidence against another, the Government must establish, by a fair preponderance of evidence independent of the hearsay (United States v. Geaney, 417 F.2d 1116, 1119-1120 (2d Cir. 1969), cert. denied sub nom.

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*See United States v. Zane, 507 F.2d 346 (2d Cir. 1974).

Lynch v. United States, 397 U.S. 1028 (1970)),* not only that a joint venture existed, but that the accused participated in it. Glasser v. United States, 315 U.S. 60, 74 (1972); United States v. Fantuzzi, 463 F.2d 683, 689 (2d Cir. 1972).

The non-hearsay evidence introduced by the Government concerning appellant Glazer's conduct demonstrated that some time in December 1973 Wagner went to appellant and advised him of the Universal relocation job, suggesting that appellant bid on it. Although appellant did not generally do relocation jobs, he decided to bid on the Universal job.** Appellant sent Harvey Marks, his estimator,

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*In United States v. James, Doc. No. 75-1082, slip opinion 5211 (2d Cir., July 29, 1975), this Court found that Geaney was not affected by United States v. Nixon, 94 S.Ct. 3090, 3104 n.14 (1974), which states that evidence sufficient to take the case to the jury is required to permit use of hearsay.

Appellant submits that the rejection of the Nixon test is incorrect. This Court's reliance on the denial of certiorari in other cases applying the Geaney test is inappropriate because the issue of the validity of the test was not raised in those cases and, in any event, a denial of certiorari is not a decision on the merits. It is also significant that in footnote 14 of the Nixon decision, the Supreme Court did not cite any of the authorities coming from this Circuit in articulating the fair preponderance test.

**Appellant Glazer acknowledged at trial that he did not generally do relocation jobs, but that he decided to bid on the Universal job because business was slow.

to the Universal plant where Marks, along with Wagner, was shown around by a Universal employee with whom Marks left a Stuyvesant business card. According to Marks, who testified for the Government, he took notes of what he saw, and did not discuss the matter with Wagner. Marks returned to appellant's office where he told Glazer that the job was enormous, making reference to the machines involved. According to Marks, he gave appellant an "off the top of his head" figure of $250,000 to $300,000 as the cost of doing the job.

Then Marks and appellant sat down and worked out the bid. A City official indicated that the proposal sheet on Stuyvesant letterhead which accompanied the bid form included more information than was necessary. This indicated the seriousness with which appellant took the bidding process.

Wagner's own statements show that he intended to submit a bid based on his rate schedule, published according to ICC regulations, with an additional flat sum for moving the machinery which, according to Sinagaglia, was below the usual cost. From Marks it was learned that appellant was known in the business to have a high ICC tariff schedule and that, although appellant often lost bids to Wagner, he was on occasion successful in bidding against Wagner.

The fact that appellant's bid was higher than Wagner's both times does not establish that the two agreed to make

it that way, nor does the fact that Wagner came to tell appellant about the job indicate that the two men agreed to fix the bid or to submit collusive bids. Appellant's high tariff schedule could have led Wagner to believe there was a good chance to beat appellant. On the other hand, from appellant's perspective, there was some reason, however slight, to hope that he might get the job because he had successfully bid against Wagner a few times in the past. In appellant's period of slow business, that hope was sufficient reason to submit a bid.

There is no evidence to show that appellant ever discussed his bid with anyone but Marks, his own estimator, or that Marks discussed the bid with anyone else. There was no indication that Marks was to do anything but prepare an accurate estimate of the job.*

Marks next testified that a City employee telephoned to tell him that Stuyvesant had not made the low bid, but that new bids had to be submitted because the first ones were defective since one building was not counted and because some material as well as the masonry and carpentry work were to be omitted. Marks and appellant discussed the new bid, and appellant arrived at a revised estimate without visiting the additional building.

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*Indeed, Marks's salary was pure commission, paid only for contracts Stuyvesant actually received.

The submission of the second bid without first looking at the added building also does not show an agreement to bid. According to Marks, the City employee called to tell them what was wrong and, although the caller did not tell them what was in the additional building, the evidence does show that he told Marks what had been improperly included in the first bid -- the materials to be shipped to Pennsylvania and the carpentry and masonry work. Both were specifically omitted in the second bid, and the bid was appropriately lower.

The evidence shows that Wagner saw all the first bids and that he examined them carefully. There is no evidence that appellant saw them or that he knew what Wagner's first bid had been or what Wagner intended to submit as his second bid.

The remaining evidence was appellant's certification in his bid that he had been asked by Universal to enter the bidding when, in fact, Wagner had asked him to enter it. There is, however, no basis for concluding that appellant's certification that Universal selected Stuyvesant to bid on the relocation job was evidence he was a party to an agreement with Wagner, Kay, or anyone else to rig the bids. Marks's reception at the Universal plant by a Universal employee who knew, prior to the filing of the bid forms, that

Marks was from Stuyvesant, could only have indicated to appellant that Universal had no objection to Stuyvesant's submission of a bid.

The Government's evidence does not establish by any test that appellant was a party to an agreement to fix the bids. The person with whom appellant had contact was Wagner, and this contact was limited to Wagner's telling appellant about the Universal job and giving him a bid form, and reporting the defects in the first bid. Appellant's acquaintanceship with Wagner obviously resulted from their being in the same business in the same geographic area. See United States v. Cantone, 426 F.2d 902 (2d Cir. 1970). No other contact between appellant and other members of the conspiracy was shown. No conversation between appellant and Wagner as to the level of the bids was shown. Marks was charged as a co-conspirator, but the contact between him and appellant was obviously that of an employer-employee relationship, and there is no indication that Marks knew or did anyting as part of a plan with Wagner, Kay, or the others.

The significance of requiring independent proof of appellant's participation in the agreement is appropriately demonstrated by this case, where the hearsay testimony is easily open to a variety of meanings and is, of itself, ambiguous. The hearsay statements prior to December 6, 1973, were part of Wagner's attempts to get the agreement formu-

lated and are easily his puffing. What is more, although appellant's name is mentioned, it was part of a discussion of movers Wagner knew, and Wagner remained unsure who the bidders would be. Statements made after December 11, 1973, relate to Wagner's contact with appellant, and are consistent with Wagner's request, innocent at least to appellant, that appellant bid on the Universal job.

Thus, the District Judge improperly admitted the hearsay evidence because there was no independent proof of the agreement, and the conviction must be reversed.

Point III

IMPOSITION OF A COMMITTED FINE ON APPELLANT WHO IS INDIGENT AND WHO, FOR THAT REASON, IS UNABLE TO PAY THE FINE AND IS THEREBY SUBJECT TO AT LEAST THIRTY ADDITIONAL DAYS IN CUSTODY IS UNCONSTITUTIONAL.

Appellant Glazer was sentenced to pay a $10,000 committed fine. The District Judge imposed this sentence with knowledge that appellant was insolvent and that he would have to apply for forma pauperis relief to proceed on appeal. While willful nonpayment of the committed fine would subject appellant to continued indefinite incarceration (18 U.S.C. §3565; Cohen v. United States, 82 S.Ct. 526, 528 (1962)), his failure to pay because of his indigency subjects him to an additional thirty-day period of incarceration (18 U.S.C. §3569).*

*At the end of the thirty days, upon application to the magistrate in which appellant establishes that he is unable to pay the fine, he is discharged. Appellant is still, of course, liable for the amount of the fine, and the United States can bring a lien against his property. Castle v. United States, 399 F.2d 642, 644 (5th Cir. 1968); United States v. Baird, 241 F.2d 170 (2d Cir. 1957); Smith v. United States, 143 F.2d 228, 229 (9th Cir. 1944); United States v. Pratt, 23 F.2d 333 (D.C. Cir. 1927).

The net effect of this procedure for the collection of fines (United States v. Baird, 241 F.2d 170 (2d Cir. 1957)) is to incarcerate appellant solely because he is poor for thirty days beyond the sentence pronounced by the District Court. Consequently, the operation of §3565 and §3569, as it affects appellant, is violative of his constitutional rights to due process and equal protection of the law,* and the denial by the court below of the motion to remit the committed fine because appellant is too poor to pay it is reversible error. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Morris v. Schoonfield, 399 U.S. 508 (1970); United States v. Wilson, 469 F.2d 368, 370 (2d Cir. 1972); Frazier v. Jordan, 457 F.2d 727 (5th Cir. 1972); McGinnis v. United States ex rel. Pollack, 452 F.2d 833 (2d Cir. 1971); United States v. Gaines, 449 F.2d 143 (2d Cir. 1971).

Because appellant's liberty, clearly a fundamental right (United States Constitution, Amendment V), is affected adversely by §3565 and §3569, the standard for evaluating the constitutionality of these sections is whether they can

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*Due process has been held to incorporate equal protection because of the absence of an equal protection clause in the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1959).

be "shown to be necessary to promote a compelling governmental interest,"* Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969), see also Survey Note, Developments in the Law: Equal Protection, 82 Harv.L.Rev. 1065 (1969).**

Clearly, the Governmental interest sought to be promoted by §3565 is to provide a coercive means to insure the collection of fines (Tate v. Short, supra, 401 U.S. at 399), and not to provide additional punishment for the crime committed. Williams v. Illinois, supra, 399 U.S. at 240; Smith v. United States, supra, 143 F.2d 228; People v. Saffore, 18 N.Y.2d 101 (1966). The jailing of an indigents, however, pursuant to this statute, runs in contravention to that interest*** for, not only is it power-

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*Since it is a vital constitutional right which is at issue, the traditional, less strict test (whether the classification is "without reasonable basis," Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911), is not applicable here. Shapiro v. Thompson, supra, 394 U.S. 618.

**Alternatively, because these provisions create two disparately treated classes -- those who can pay the fine immediately and those who can satisfy it only over a period of time, if at all -- defined by wealth, the classification is "suspect, and triggers the imposition of the compelling state interest test." Frazier v. Jordan, supra, 457 F.2d at 728; see also In re Antazo, 473 P.2d 999 (Cal.Sup.Ct. 1970).

***As an alternative the Supreme Court suggests an installment method of fine collection. Tate v. Short, supra, 404 U.S. at 399.

less to compel, in these circumstances, payment of the fines; it also imposes upon the Government the additional expense of incarceration. As the Supreme Court cogently observed in Tate v. Short, supra:

> [T]he defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenues, saddles the [Government] with the cost of feeding and housing him for the period of his imprisonment.
>
> Id., 401 U.S. at 399.

Failing the test of necessity to the promotion of a valid governmental interest, the consequent discrimination engendered by the statute between those who can afford to pay the fine and go free and those who cannot pay it and therefore stay in jail is unconstitutional. Tate v. Short, supra, 401 U.S. at 399. Where imprisonment "results directly from an involuntary non-payment of a fine, ... we are confronted with an impermissible discrimination that rests on ability to pay...." Williams v. Illinois, supra, 399 U.S. at 241; Morris v. Schoonfield, supra, 309 U.S. 508.

Relying upon Williams and Tate, this Court has noted that the revocation of probation and the imposition of a prison term solely because of impecunity would not meet constitutional standards, United States v. Wilson, supra, 469 F.2d at 370, and earlier, in a proceeding to correct a sentence so as to credit a defendant with the time spent in a state facility because he could not make bail, this

Court held that "a man should not be kept in prison solely because of his lack of wealth...." McGinnis v. United States ex rel. Pollack, supra, 452 F.2d at 836, citing United States v. Gaines, supra, 449 F.2d 143.

The unconstitutionality of §3569 is acknowledged by the Government in Bureau of Prisons Policy Statement 2101.2A (June 25, 1971),* which concludes:

> ... The United States Attorney should be advised that no commitment for non-payment pursuant to 18 U.S.C. 3569 will be carried out in view of the Supreme Court's ruling in the Williams and Tate cases. A copy of that notification to the United States Attorney should be sent to the Office of General Counsel of the Bureau.

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*The Policy Statement is "D" to appellant's separate appendix.

Point IV

UNDER THE CIRCUMSTANCES OF THIS CASE, THE $10,000 FINE WAS CRUEL AND UNUSUAL PUNISHMENT, AND SO OPPRESSIVE AS TO REQUIRE THIS COURT TO VACATE THAT PART OF THE SENTENCE.

In addition to imposing a three-month term of imprisonment, the District Judge also fined appellant $10,000. As previously indicated, the record reflects that appellant was insolvent at the time sentence was imposed. Further, affidavits he filed with this Court, which resulted in assignment of counsel under the Criminal Justice Act, show he has no earned income, property, or savings. Under the circumstances, the imposition of a $10,000 fine upon a sixty-three year old individual with no present earned income and no foreseeable one is so cruel as to be violative of the Eighth Amendment, and is at least so oppressive as to warrant a vacature of the fine by this Court in its supervisory power.

The circumstances here indicate that the $10,000 fine will be a continuing burden to appellant for the duration of his life, since it appears he will be unable to meet that obligation. It is particularly onerous here where, even if appellant were a party to the agreement, a fact not conceded, he in no way benefited from his involvement, received no financial gain, and is also punished by a term of imprisonment.

The fine imposed here must be contrasted to sentences imposed on others with greater means. In United States v. Saks & Co., S.D.N.Y. 74 Cr. 940, a conspiracy of five years' duration among New York's most elite department stores to fix prices, the individual defendant, a vice-president of one of the stores, was sentenced to one day's unsupervised probation and a $25,000 fine, with the specific provision that he not be committed for non-payment of the fine.

In United States v. Capo, S.D.N.Y. 73 Cr. 1095, an assistant District Attorney in Bronx County convicted for participation in a broad conspiracy to sell and distribute narcotic drugs, received a two-year period of probation and a $2,500 fine to be paid on terms directed by the Probation Department.

In the United States District Court for the Southern District of California, C. Arnholdt Smith, a millionaire, was sentenced to a $30,000 fine to be paid at the rate of $100 per month over twenty-five years with no interest. Mr. Smith's crime was said to have been "one of the largest systematic lootings of a public company ever recorded in the history of this country." FORBES MAGAZINE, at 17 (August 15, 1975).

In each of these cases, involving crimes far more serious and damaging than that involved here, it was payment of the fine in which the sentencing court was interested when imposing sentence. The fine was one the defendant was

able to pay, and the consequences of the penalty were limited to establishing reasonable payment terms, no interest, or specific prohibition against incarceration for non-payment.

By way of contrast is this case, where the fine must be called vindictive and the consequences oppressive. The District Judge was aware of appellant's indigency, his age, and the poor state of his business. He was also aware that the Government did not intend to prosecute appellant if no one else went to trial, that appellant received no benefit from submitting the bid, and, of course, that he was to be imprisoned.

Accordingly, this Court should vacate the sentence as being cruel and in violation of the Eighth Amendment, or should act in its supervisory power to vacate the fine as an inappropriate sentence under the circumstances.

CONCLUSION

For the above-stated reasons the judgment below should be reversed and the indictment dismissed; alternatively, a new trial should be ordered; at minimum, the $10,000 fine should be vacated.

Respectfully submitted,

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Certificate of Service

Aug 18, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Philip Abbott Dewey